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No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1931

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHICAGO PORTRAIT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 16-22) is reported in 16 B. T. A. 1129. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 36–38) is reported in 50 F. (2d) 683.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 11, 1931. (R. 38.) The petition for certiorari was filed September 11, 1931, and the writ was granted October 26, 1931. Jurisdiction is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the State of New South Wales is a "foreign country" within the meaning of Section 238 of the Revenue Act of 1921, which allows credit against income tax on account of income taxes paid to a "foreign country."

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are contained in Appendix A, *infra*, pp. 22–27.

STATEMENT

The stipulated facts contained in the findings of fact of the Board of Tax Appeals may be summarized as follows (R. 16–18):

During the calendar year 1923, the respondent, an Illinois corporation, was the owner of 51 per cent of the voting stock of the International Art Company of Sydney, Australia, a foreign corporation (hereinafter referred to as the Australian corporation). During that year, the Australian corporation declared dividends, respondent's share of which, at the then current rate of exchange, aggregated $18,415.67.

The Australian corporation paid income taxes to the Commonwealth of Australia, to the State of New South Wales and to the Dominion of New Zealand, upon its net income for fiscal years ending June 30, 1923, and June 30, 1924. Petitioner refused to allow any credit against income taxes due from respondent to the United States on account of

income taxes paid by the Australian corporation to the State of New South Wales, but he did allow credit on account of such taxes paid to the Commonwealth of Australia and the Dominion of New Zealand. The Board held that respondent was entitled to credit for taxes paid to New South Wales. (R. 18–22.) The court below affirmed the decision of the Board. (R. 36.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the State of New South Wales is a "foreign country" within the meaning of this term as used in Section 238 of the Revenue Act of 1921.

2. In holding, in effect, that Congress in enacting Section 238 intended to allow credit for income and profits taxes imposed by any governmental authority foreign to the United States.

SUMMARY OF ARGUMENT

The term "foreign country" has been defined by the applicable regulations as including "any foreign sovereign state or self-governing colony" under all the Revenue Acts since 1918. Although there has been some slight departure therefrom in practice under other sections of the Revenue Acts, it has been consistently applied under this section and the rulings of the Bureau of Internal Revenue thereunder have followed this construction. The construction has implied legislative approval. It is supported by judicial interpretation of the word

"country" and conforms to the usage of that word in international law. As the provision for credit is in the nature of an exemption, it is to be construed most strongly in favor of the Government.

New South Wales is not a foreign country within the meaning of Section 238(a) or of Article 382 of Regulations 62. It is not a sovereign state in the international sense, but is a constituent state of the Commonwealth of Australia. Its position in the Commonwealth closely resembles that of a State of the United States in our Federal Government.

It is not a self-governing colony. This term was used in the Treasury Regulations synonymously with sovereign state so as to embrace the great self-governing dominions of the Commonwealth of British Nations. Under the modern conception these dominions are international states, and hence are within the meaning of "foreign country" as defined in Article 382.

ARGUMENT

I

ONLY TAXES PAID TO A FOREIGN SOVEREIGN STATE OR A SELF-GOVERNING COLONY ARE DEDUCTIBLE UNDER SECTON 238 OF THE REVENUE ACT OF 1921

Section 238 of the Revenue Act of 1921 (*infra*, p. 22) provides for crediting, against income taxes due from domestic corporations owning a majority of the stock of foreign corporations upon

which dividends are paid, of a part of the taxes paid by such foreign corporations to "any foreign country."

We contend that the term "foreign country" as so used means a foreign sovereign state or self-governing colony.

In the court below the respondent contended broadly that the phrase includes any foreign authority which imposes income or profits taxes whether it be of the dignity of a sovereign state or the most insignificant political subdivision or dependency.

The term has been defined by Regulations under all the Revenue Acts since that of 1918 as meaning any foreign sovereign state or self-governing colony. (See pp. 28–32, *infra.*)

Provisions allowing to corporations a credit of taxes paid to a foreign country first appeared in the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1080, 1081, Section 238 (a) and 240 (*e*). So far as the use of these words is concerned, no change has been made by Congress in the succeeding Revenue Acts, where the same language is found.[1] In the Treas-

[1] Section 238 (a) and (e) of the Revenue Act of 1921, c. 136, 42 Stat. 227 (*infra*, pp. 22–24); Section 238 (a) and (e) of the Revenue Act of 1924, c. 234, 43 Stat. 253 (U. S. C., Title 26, Sec. 990); Section 238 (a) and (e) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Sec. 990); and Section 131 (a) (1) and (f) of the Revenue Act of 1928, c. 852, 45 Stat. 791 (U. S. C. Sup. V, Title 26, Sec. 2131.)

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ury Regulations under the Act of 1918, the definition of foreign country was adopted which later appeared in Article 382 of Regulations 62, (*infra*, p. 25) under the Act of 1921, and it has been continued in the same form in the Regulations under all of the Revenue Acts since enacted.[2]

In connection with the definition of the phrase "foreign country" contained in this long series of Regulations, three examples were always given in the Regulations. The definition was said to include a self-governing colony (for example, the Dominion of Canada); not to include a foreign municipality (for example, Montreal) unless itself a sovereign state (for example, Hamburg). The definition seems clear enough without resort to example, nor does the use of examples, if ill-chosen, limit the definition. The fact that Hamburg lacked

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[2] Article 382, Regulations 45 (promulgated April 17, 1919, and also 1920 Edition, promulgated January 28, 1921), under the Revenue Act of 1918 (made applicable to credits under Section 238, Article 611, Regulations 45); Article 382, Regulations 65, under the Revenue Act of 1924; Article 382, Regulations 69, under the Revenue Act of 1926; Article 692, Regulations 74, under the Revenue Act of 1928.

The "Preliminary Edition" of Regulations 45, in Article 382, defined the term as follows: "'Foreign country' means any governmental authority, not that of the United States or any part or possession thereof, having power to impose such taxes, and it therefore includes a self-governing colony, such as the Dominion of Canada." But this draft of Regulations was in force only a short time as the Act of 1918 was approved February 24, 1919, and the first regular edition of Regulations 45, adopting the definition since followed, was issued April 17, 1919.

some of the attributes of a sovereign state, as that phrase is used in international law, does not open the definition to include all subordinate subdivisions of a foreign government. Such agencies are not sovereign states. The error obviously was in specifying Hamburg as an example of a sovereign state. The example was ill chosen but this mistake does not qualify the statement of the rule which is clear enough.

While the rule has remained in all of the Regulations since those under the Revenue Act of 1918, apparently there has been some departure therefrom in the practice of the Bureau of Internal Revenue under two other sections of the law. Section 222 (a) of the Revenue Act of 1921 (*infra*, p. 24) allows credits to alien resident individuals of income and profits taxes paid to any foreign country if the foreign country of which such alien resident is a citizen or subject allows a similar credit to citizens of the United States residing in such country. The Regulations applicable to Section 222 (a) list certain "countries" which satisfy and others which do not satisfy the credit requirements of Section 222. Article 385, Treasury Regulations 62, *infra*, pp. 26–27.[3] Another list is given in Regulations under the later Revenue Acts with

[3] Similar lists were contained in Article 307, Regulations 45, relating to the reciprocal allowance of credits for personal exemption and for dependents, provided for by Section 216 (e) of the Revenue Act of 1918. (This provision does not appear in the subsequent acts.)

respect to provisions similar to Section 213 (b) (8) of the Revenue Act of 1921 (*infra*, p. 24), which excludes from the income of a nonresident alien or foreign corporation earnings derived from ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States.[1] Without attempting to analyze the nature of the governments of the "countries" mentioned in these lists, it may be conceded that several of them lack the autonomy necessary to bring them within the definition of "foreign country" contained in Article 382, Regulations 45, and succeeding Regulations containing an identical definition. These comparatively isolated departures in practice do not affect the administration or construction of Section 238 of the Revenue Act of 1921. They do not show a substantial disregard of the definition of the same phrase in another connection. So far as they are relevant at all they are, in effect, further manifestations of an inept choice of examples, but they do not enlarge or restrict the general definition. The definition embodied in Article 382 of Regulations 62 has been adhered to in theory and we believe that it has been consistently applied under Section 238.

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[1] Article 66, Regulations 65, and Article 89, Regulations 69, relating to Section 213 (b) (8) of the Revenue Acts of 1918 and 1919 (U. S. C. Title 26, sec. 954, and U. S. C. Supp. [illegible] sec. 954); Articles 1042 and 1102, Regulations 74, under the Revenue Act of 1926.

In a ruling made October 18, 1919, Solicitor's Memorandum 1187, not reported (Appendix B, *infra*, p. 28) it was held that a canton of Switzerland was not a sovereign state so as to be classified as a country. It was said:

> In the absence of some qualifying phrase, the word "country" in the revenue laws of the United States has always been held to mean the composite whole made up of all the subdivisions of a foreign State subject to the same central control. Each of the subdivisions, in this sense, is not a "country," but a part of a "country." * * *

It was likewise ruled that the Province of British Columbia in the Dominion of Canada was not a foreign country within the meaning of Sections 222, 234 (a) (3), and 238 of the Revenue Act of 1918, and Article 382 of Regulations 45. Office Decision 1050, Cumulative Bulletin 5 (Jul.–Dec., 1921), p. 194 (Appendix B, *infra*, p. 30). It has also been ruled that Tasmania, South Australia, Western Australia, and New South Wales, being constituent states of the Commonwealth of Australia, are not foreign countries. Solicitor's Memorandum 1614, III–1, Cumulative Bulletin (Jan.–June, 1924), p. 227 (Appendix B, *infra*, p. 31).

Thus the administrative construction of the phrase "foreign country" as used in Section 238 of the Revenue Act of 1918 and in the similar provisions of subsequent acts limits it to sovereign states and self-governing colonies. So

far as we have been able to ascertain the practice under this section has uniformly followed this construction. While the phrase construed has a well-settled meaning which is in accordance with the construction, it might perhaps have been defined so as to have a somewhat wider application. It was therefore open to construction by the administrative officers. The long and consistent administrative construction was certainly an admissible one, and it is not to be overruled unless plainly wrong. *Universal Battery Co.* v. *United States,* 281 U. S. 580, 583; *Fawcus Machine Co.* v. *United States,* 282 U. S. 374, 378. The reenactment of the same provision without substantial change imports legislative approval of the administrative construction. *Brewster* v. *Gage,* 280 U. S. 327, 337; *Poe* v. *Seaborn,* 282 U. S. 101, 117; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492.

The administrative construction of the phrase "foreign country" is supported by several decisions and is consistent with its meaning when used in other Federal statutes and in international law.

In *Stairs* v. *Peaslee,* 18 How. 521, construing a provision of the Tariff Act of March 5, 1851, c. 38, 9 Stat. 629, this Court adopted the following definition of "country" (p. 526):

> * * * the word country in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign State however widely separated,

> which are subject to the same supreme executive and legislative control. The question was brought before the treasury department in 1817; and, on the 29th of September in that year, instructions were issued by the department, in a circular addressed to the different collectors, in which the construction above stated is given to the word. The practice of the government has ever since conformed to this construction; and it must be presumed that congress, in its subsequent legislation on the subject, used the word according to its known and established interpretation.
>
> Apart, however, from this consideration, we regard the construction of the treasury department as the true one. Congress certainly could not have intended to refer to mere localities or geographical divisions, without regard to the state or nation to which they belonged.

This construction of "country," as embracing "all the possessions of a foreign State" was quoted with approval in *Faber* v. *United States,* 221 U. S. 649, 658. See also *United States* v. *The Ship Recorder,* 1 Blatchford 218 (S. D. N. Y.).

In the court below respondent relied on *Pearcy* v. *Stranahan,* 205 U. S. 257. In that case the question was whether by the treaty with Spain the Isle of Pines became a part of the United States. It was held "foreign country" so as to subject to duty articles brought therefrom into the United States, but this was because it was under the juris-

diction and sovereignty of the Republic of Cuba (p. 272). This decision is not inconsistent with *Stairs* v. *Peaslee, supra.* The same is true of *DeLima* v. *Bidwell,* 182 U. S. 1, and *Fourteen Diamond Rings* v. *United States,* 183 U. S. 176, in which it was held that, after the treaty of peace with Spain, Porto Rico and the Philippine Islands became territory of the United States. In the latter case this Court said (p. 179), "The Philippines thereby ceased, in the language of the treaty, 'to be Spanish.' Ceasing to be Spanish, they ceased to be foreign country." It is clear that neither the Philippines nor Porto Rico, considered separately, was regarded by this Court as having been a "foreign country" prior to the treaty, but each was regarded as a part of the country of Spain. Cf. *United States* v. *Rice,* 4 Wheat. 246.

The term "foreign country" appears in certain statutes relating to the foreign service of the United States where it is apparent Congress uses it in reference to foreign states or governments in the sense of international persons, *e. g.,* Act of February 5, 1915, c. 23, 38 Stat. 807, Sec. 7 (U. S. C., Title 22, Sec. 38); Act of June 14, 1878, c. 193, 20 Stat. 131 (U. S. C., Title 22, Sec. 177); Act of June 4, 1920, c. 223, 41 Stat. 751, Sec. 4 (U. S. C., Title 22, Sec. 216); Act of April 29, 1926, c. 195, 44 Stat. 333, Title I (U. S. C. App., Title 22, Sec. 291).

The definition of foreign country contained in Article 382, Treasury Regulations 62 (*infra*, p. 25), is consistent with the definition adopted in *Stairs* v. *Peaslee, supra; Faber* v. *United States, supra;* and *United States* v. *The Ship Recorder, supra.* The term "country" is used in the same sense to define a state or person in international law. Hyde, International Law, Vol. I, pp. 16–17; Moore, International Law Digest, Vol. I, pp. 14–18, and authorities cited; Hall, International Law, p. 17, *et seq.;* Wheaton, International Law, 6th Ed., Vol. 1, pp. 38 *et seq.*

The respondent contended in the court below that the administrative construction of the phrase "foreign country," in Section 238 of the Revenue Act of 1918, was too narrow to be consistent with the purpose of the statute. It was argued that Congress intended by Section 238 to relieve American business from the burden of all double taxation upon income resulting from foreign taxes and that there is no room, within the general purpose of the law, for an interpretation of Section 238 which excludes a credit for any tax upon income exacted by any political subdivisions of a foreign country.

An examination of the legislative history of the Revenue Act of 1918 and the subsequent acts containing provisions similar to Section 238 in the 1918 Act does not disclose any authoritative declaration as to the meaning of the phrase "foreign country" used in Section 238 and in subsequent

legislation of the same character. While the purpose of Congress in enacting Section 238 was undoubtedly to relieve against some of the burdens of double taxation, there is nothing in the legislative history to show that Congress intended to relieve against all such burdens. In these circumstances the administrative construction acquiesced in by Congress for many years should be regarded as furnishing a safe guide to the legislative intent.

Relief from international double taxation has been the subject of international negotiation, and the nature and scope of those negotiations indicate that the nations generally have been concerned only with relieving their nationals from double taxation by sovereign states and not from that of political subdivisions.

The general conferences of experts on Double Taxation and Tax Evasion, held under the auspices of the League of Nations, were attended only by representatives of international states.[4] In their reports these experts embodied forms of treaties or conventions which were recommended in the interest of uniformity to relieve the burdens of double taxation.[5] These reports and the forms of

[4] Australia did not have a representative present, but there were representatives of Irish Free State and the Union of South Africa at the meeting held at Geneva in October, 1928.

[5] Report presented by General Meeting of Government Experts on Double Taxation and Tax Evasion, Geneva, April, 1927, League of Nations Publication C 216-M85, 1927 II; similar report of October, 1928, League of Nations Publication C 562-M178, 1928 II.

suggested treaties deal only with taxes imposed by the general governments of the several countries and do not refer to taxes imposed by constituent states, territorial subdivisions, municipalities, or colonies.'

The right to credit taxes paid to a foreign country is in the nature of an exemption, since the credit operates to reduce the amount of tax which would otherwise be payable. Its effect is to confer upon the taxpayer an extraordinary benefit. If there were any doubt about the intention of Congress, it should be resolved in favor of the Government *Cornell* v. *Coyne*, 192 U. S. 418, 431; *Swan & Finch Co.* v. *United States*, 190 U. S. 143, 147; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146.

There is no provision in the revenue acts which permits the crediting of taxes imposed by a State of the United States against income and profits taxes imposed by the United States. State taxes are deducted from gross income in computing net income, under Section 234 (a) (3) of the Revenue Act of 1921. It is not to be presumed that Congress

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'In a paper entitled "Double Tax Relief for Foreign Trade in the Revenue Act," published in National Income Tax Magazine, May, 1929, by Mitchell B. Carroll, it is stated that "By 'foreign country' is meant a sovereign state. In the case of a country such as Canada, the credit applies to the Dominion income tax but not to the income taxes levied by the Provinces." Mr. Carroll, formerly Chief of the Section of European Law and Taxes, U. S. Department of Commerce, attended the meetings on double taxation at Geneva as one of the American experts.

intended to allow credits to corporations for taxes paid to states or other subdivisions of foreign countries while withholding similar credits for taxes paid to States of the United States. It is more reasonable to infer that the purpose was to relieve the taxpayer from taxes imposed by another country sovereign in the same sense as is the United States, thus, in a measure, equalizing the taxes imposed upon the income of taxpayers, whether derived from domestic or from foreign investments. To have extended the exemption so as to allow the credit of taxes imposed by all subordinate subdivisions of a foreign country would have resulted in discrimination rather than equalization. No such intention can fairly be imputed to Congress, particularly when the discrimination would operate against domestic investments and in favor of foreign investments.

II

NEW SOUTH WALES IS NOT A "FOREIGN COUNTRY" WITHIN THE MEANING OF SECTION 238 (A) OF THE REVENUE ACT OF 1921

By the Commonwealth of Australia Constitution Act, 63 & 64 Victoria, c. 12 (see extracts, *infra*, pp. 33–42), New South Wales became a state of the Commonwealth of Australia. The position of New South Wales in the Commonwealth is analagous to that of a State in the United States. Indeed, it appears that the form of government of the United States was used as a pattern in fashioning the Con-

stitution of the Commonwealth.[8] That Constitution created the Commonwealth of Australia, a new entity, vested with exclusive power over certain matters, power coordinate with powers possessed by the constituent states over other matters and with paramount authority in case of conflict. Certain other powers remained with the states. (See Keith, Responsible Government in the Dominions, 2d Ed., Vol. II, pp. 605 *et seq.;* see also *Attorney General for the Commonwealth of Australia* v. *The Colonial Sugar Refining Co., Ltd.* [1914] A. C. 237.)

The parliament of the Commonwealth is granted, subject to the constitution, general powers, among others over trade and commerce with other countries and among the states; taxation; bounties on the production or export of goods; borrowing money; postal, telegraphic, telephonic, and other like services; the naval and military defense of the Commonwealth and of the several states; navigation; quarantine; currency, coinage, and legal tender; copyrights, patents, and trade marks; naturalizations and aliens; immigration and emigration; external affairs. (Section 51, *infra,* pp. 35–38.) It is provided that the Commonwealth shall protect every state against invasion and, on

[8] In *Attorney General For the Commonwealth of Australia* v. *The Colonial Sugar Refining Co., supra,* it is said (p. 254), "In fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada."

the application of the executive of the state, against domestic violence. (Section 119.)

The former colonies which agreed to unite in the federal Commonwealth under the constitution are defined as states, "and each of such parts of the Commonwealth shall be called 'a State'." (Par. 6, Constitution Act, *infra*, p. 34.) In referring to powers reserved to the states, the constitution speaks of "a Colony which has become or becomes a State." (Sections 107, 108.)

It is apparent from these constitutional provisions that New South Wales is not a sovereign state, except in the limited sense in which a State of the United States is a sovereign State. It is not permitted to have relations with states outside of the Commonwealth. Westlake, International Law, Part I, p. 2.[1] It is not, we submit, a state in the sense of international law (see authorities cited, *supra*, p. 13), and does not come within the term "foreign country" as that phrase is used in Section 238 of the Revenue Act of 1921.

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[1] Westlake says (International Law, Part I, p. 2), "The original components of the United States of America, as Massachusetts and New York, became states of international law when they won their independence, but since by the terms of their union they have lost both the possibility of foreign relations and even complete supremacy at home, the name of state has been retained by them only as a memory. In the Australian Commonwealth the name is not even a memory. There the parts, as New South Wales and Victoria, have always been included in the British dominions, and have now received the name of state by way of compliment. * * *"

While the opinion of the court below proceeds upon the broad ground that Section 238 permits credit for income taxes paid to any foreign government, whatever its form or degree of sovereignty, that court also concluded that New South Wales was a self-governing colony. We submit, however, that New South Wales is not a "self-governing colony" within the meaning of Article 382 of Regulations 62, *infra*, p. 25. This term undoubtedly is used as synonymous with "sovereign state" so as to embrace within "foreign country" the great self-governing dominions of the British Empire.

Under the conception which formerly prevailed among nations with scattered possessions, regarded as colonies without power to deal with their major affairs except through the administrative or legislative machinery of the nation to which they belonged, it is doubtful whether any colony or dominion of a sovereign state would have been recognized as a separate entity in international law, and probably none of them would have been a "foreign country" within the definition with which we are dealing. Formerly Australia and Canada were not regarded as sovereign states or countries but were considered as parts of Great Britain. This was the position of Nova Scotia in 1855, at the time of the decision in *Stairs* v. *Peaslee, supra.* Nova Scotia then was a colony with a certain measure of self-government (Keith, Responsible Government in the Dominions, Vol. I, pp. 6, 19, 507) and was

held in *Stairs* v. *Peaslee* to be a part of the country of Great Britain.

In later times, however, an international status has developed for the British Dominions.[10] It has gradually been recognized that a new form of state has emerged in international law which, having nearly all, if not all, of the attributes of sovereignty, was able to attain a place of virtual independence among the family of nations while remaining a constituent part of the British Commonwealth of Nations. This development received international recognition in 1912, when the dominions were separately represented at the Conference on Radio Telegraphy. After the Great War the Commonwealth of Australia and the other dominions participated in the Peace Conference of 1919, the Treaty of Versailles with Germany was signed for each by its own representatives, and they were accepted as original members of the League of Nations. In 1927 Canada was elected a member of the Council of the League. The dominions may now be represented diplomatically in foreign countries and receive such representatives. (Wheaton's International Law, Vol. I, 6th Ed. (1929), pp. 129–133; Hyde, International Law, p. 87, note 3.) While it is true that Australia, New Zealand, and Canada are within the Commonwealth of British Nations, under the modern conception of these entities they are international states, and hence they are countries within

[10] See International Conciliation, Bulletin No. 228, March, 1927, on the British Commonwealth of Nations.

the meaning of Section 238 and Article 382 of Regulations 62. It may be that such dominions are in a sense self-governing colonies, but to say that they are not international states is to ignore their present relation to Great Britain and the other nations.

However these dominions may be classified, it seems clear that New South Wales is neither an international sovereign state nor a self-governing colony within the ordinary definition of these terms. It is no longer merely a colony of Great Britain. Its relation to the Commonwealth of Australia is as a constituent part of the federal union. It is not "self-governing" except in those matters as to which authority is not vested in the Commonwealth. The administrative rulings under the regulations have failed to recognize New South Wales as a self-governing colony and we submit that they are correct and should not be disturbed.

CONCLUSION

The decision of the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

WHITNEY NORTH SEYMOUR,
SEWALL KEY,
ANDREW D. SHARPE,
Special Assistants to the Attorney General.

DECEMBER, 1931.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 237, 249, 254, 258:

SEC. 238. (a) That in the case of a domestic corporation the tax imposed by this title, plus the war-profits and excess-profits taxes, if any, shall be credited with the amount of any income, war-profits, and excess-profits taxes paid during the same taxable year to any foreign country, or to any possession of the United States: *Provided*, That the amount of credit taken under this subdivision shall in no case exceed the same proportion of the taxes, against which such credit is taken, which the taxpayer's net income (computed without deduction for any income, war-profits, and excess-profits taxes imposed by any foreign country or possession of the United States) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. In the case of domestic insurance companies subject to the tax imposed by section 243 or 246, the term "net income," as used in this subdivision means net income as defined in sections 245 and 246, respectively.

* * * * *

(e) For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation

from which it receives dividends (not deductible under section 234) in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: *Provided,* That the credit allowed to any domestic corporation under this subdivision shall in no case exceed the same proportion of the taxes against which it is credited, which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. The term "accumulated profits" when used in this subdivision in reference to a foreign corporation, means the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income; and the Commissioner with the approval of the Secretary shall have full power to determine from the accumulated profits of what year or years such dividends were paid; treating dividends paid in the first sixty days of any year as having been paid from the accumulated profits of the preceding year or years (unless to his satisfaction shown otherwise); and in other respects treating dividends as having been paid from the most recently accumulated gains, profits, or earnings. In the case of a foreign corporation, the income, war-profits, and excess-profits taxes of which are determined on the basis of an

accounting period of less than one year, the word "year" as used in this subdivision shall be construed to mean such accounting period.

SEC. 213. That for the purposes of this title * * * the term "gross income"—

* * * * *

(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * *

(8) The income of a nonresident alien or foreign corporation which consists exclusively of earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States; * * *

SEC. 222. (a) That the tax computed under Part II of this title shall be credited with:

(1) In the case of a citizen of the United States, the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country or to any possession of the United States; and

(2) In the case of a resident of the United States, the amount of any such taxes paid during the taxable year to any possession of the United States; and

(3) In the case of an alien resident of the United States, the amount of any such taxes paid during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country; * * *

SEC. 234 (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

(3) Taxes paid or accrued within the taxable year except (a) income, war-profits, and excess-profits taxes imposed by the authority of the United States, (b) so much of the income, war-profits and excess-profits taxes imposed by the authority of any foreign country or possession of the United States as is allowed as a credit under section 238, * * *

Treasury Regulations 62:

ART. 611. *Credit for foreign taxes.*— * * * For the meaning of the terms used in section 238 of the statute see section 2 and article 382. * * *

ART. 382. *Meaning of terms.*—"Amount of * * * taxes paid during the taxable year" means taxes proper (no credit being given for amounts representing interest or penalties) paid or accrued during the taxable year on behalf of the individual claiming credit. "Foreign country" includes within its meaning any foreign sovereign state or self-governing colony (for example, the Dominion of Canada), but does not include a foreign municipality (for example, Montreal) unless itself a soverign state (for example, Hamburg). "Any possession of the United States" includes, among others, Porto Rico, the Philippines, and the Virgin Islands. As to the meaning of "sources" see section 217. See also section 2 of the statute.

ART. 385. *Countries which do or do not satisfy the similar credit requirement.*—(a) The following is an incomplete list of the countries which satisfy the similar credit requirement of section 222 (a) (3) of the Revenue Act of 1921, either by allowing to the citizens of the United States residing in such countries a credit for the amount of income, war profits, or excess profits taxes paid to the United States, or in imposing such taxes, by exempting from taxation the incomes received from sources within the United States by citizens of the United States residing in such countries: Bulgaria, Canada, Italy, Newfoundland, Salvador. (b) The following is an incomplete list of the countries which do not satisfy the similar credit requirement of section 222 (a) (3) of the Revenue Act of 1921, either by allowing no credit to citizens of the United States residing in such countries, for the amount of income, war profits, or excess profits taxes paid to the United States, or because such countries do not impose any income, war profits, or excess profits taxes: Argentina, Bahama, Belgium, Bermuda, Bolivia, Bosnia, Brazil, Chile, China, Costa Rica, Dutch Guiana, Ecuador, Egypt, Finland, France, Great Britain and Ireland, Guatemala, Herzegovina, India, Jamaica, Japan, Montenegro, Morocco, New Zealand, Nicaragua, Panama, Paraguay, Persia, Peru, Portugal, Rumania, Santo Domingo, Serbia, Siam, Straits Settlements, Sweden, Switzerland, Venezuela. The former names of certain of these territories are here used for convenience in spite of the actual or possible change in the name or sovereignty. A resident of the United States who is a citizen or subject of any country in the first list

is entitled, for the purpose of the total tax due the United States for 1921 (as to fiscal years beginning in 1920, see art. 386) and subsequent years, to a credit for the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country. If he is a citizen or subject of any country in the second list, he is not entitled to such credit. If he is a citizen or subject of a country which is in neither list, then to secure the desired credit he must prove to the satisfaction of the Commissioner that his country satisfies the similar credit requirement of the statute.

APPENDIX B

SOLICITOR'S MEMORANDUM NO. 1187

INCOME TAX: SECTION 216 (e), REVENUE ACT OF 1918

(A Canton of Switzerland is not a "country" within the meaning of Section 216 (e), Revenue Act of 1918)

OCTOBER 18, 1919.

INCOME TAX UNIT:

Upon a careful reconsideration of the question as to whether the Cantons of Switzerland are sovereign states so as to be termed countries within the meaning of the similar credit requirement of Section 216 (e) of the Revenue Act of 1918, it is believed that office memorandum dated May 6, 1919, suggesting a letter to the Swiss Minister, holding that the Cantons of Switzerland are sovereign states should be overruled.

Section 216 (e) of the Revenue Act of 1918 provides:

> In the case of a nonresident alien individual who is a citizen or subject of a country which imposes an income tax, the credits allowed in subdivisions (d) and (e) shall be allowed only if such country allows a similar credit to citizens of the United States not residing in such country.

In International Law the word "country" is synonymous with the words "nation" or "state." "The term 'country' seems to be well understood,

and commonly signifies the state of which one is a member; in a more confined sense, the state, or even more particularly the term or place of one's birth * * *. Its metaphorical meaning is no less definite and well understood, and, in common parlance, in historical and geographical writings, in diplomacy, legislation, treaties, and international codes, not to refer to sacred writ, the word is employed to denote the population, the nation, the state, the government having possession and dominion over the country." (15 Corpus Juris, 670. See also Vattel, Law of Nations, Chap. XIX, Sec. 122; Dicey, Conflict of Laws, 2nd ed., p. 69; *U. S.* v. *Recorder* 27, Fed. Cas. 718).

In the absence of some qualifying phrase, the word "country" in the revenue laws of the United States has always been held to mean the composite whole made up of all the subdivisions of a foreign State subject to the same central control. Each of the subdivisions, in this sense, is not a "country," but a part of a "country." "Congress certainly could not have intended to refer to mere localities or geographical divisions, without regard to the state or nation to which they belonged." (*Stairs* v. *Peaslee,* 18 How. 521, 526; see also *Campbell* v. *Barnes,* 4 Fed. Cas. 2354; *Faber* v. *U. S.,* 221 U. S. 649.)

In Wheaton International Law, 5th ed., p. 73–86, it is said:

> In 1874 the Swiss Constitution was again revised, and some serious changes were made. The power of the Federal Government was greatly strengthened, and the maintenance and control of the army was conferred upon it. Switzerland has now

ceased to be a system of confederated states ("Staatenbund"), and has become as "compositive" State ("Bundesstat"). (See also Woolsey International Law, Sec. 37, 16 Ruling Case Law, 101.)

It is concluded, therefore, that the Cantons of Switzerland do not constitute sovereign states, but rather that the Federal Government of Switzerland is a compositive State, taking in all the Cantons.

* * * * *

(Signed) ROBERT N. MILLER,
Solicitor of Internal Revenue.

OFFICE DECISION NO. 1050

(C. B. 5, p. 194)

39–21–1844
O. D. 1050

Section 222, Article 382: Meaning of terms. (Also Section 214 (a) 3, Article 131.)

The term "foreign country" as used in sections 238 (a) and 234 (a) 3 of the Revenue Act of 1918 is held to mean the composite whole made up of all the subdivisions of a foreign State subject to the same central control. Each of the subdivisions, in this sense, is not a "country" but a part of a "country." The Province of British Columbia, therefore, does not come within the meaning of the term "foreign country" as contemplated by the statute.

Amounts of mineral tax and income tax paid or accrued to the Province of British Columbia by a domestic corporation are deductible as business expenses from the taxable income of the corporation.

SOLICITOR'S MEMORANDUM NO. 1614

(C. B: III–1, p. 227)

Article 382: Meaning of terms. III–12–1433
S. M. 1614

Revenue Act of 1918:

> Tasmania, South Australia, Western Australia, and New South Wales are not "foreign countries" within the meaning of section 238 (a) of the Revenue Act of 1918, but are subdivisions of the Commonwealth of Australia.
>
> The Union of South Africa is one of the self-governing colonies of the British Empire and comes within the definition of "foreign country."
>
> The tax of the Italian Government known as "richezza mobile" is held to be a personal property tax, for which a claim for credit may not be allowed. The tax is, however, deductible as a business expense.

Among the foreign countries to which the M corporation paid income and profits taxes and for which it seeks credits are Tasmania, South Australia, Western Australia, New South Wales, and Union of South Africa.

In Office Decision 1050 (C. B. 5, p. 194) it was held:

> That the term "foreign country" as used in sections 238 (a) and 234 (a) 3 of the Revenue Act of 1918 is held to mean the composite whole made up of all the subdivisions of a foreign State subject to the same central control. Each of the subdivisions in this sense is not a "country" but a part of a "country." The Province of British Columbia, therefore, does not come within the meaning of the term "foreign country" as contemplated by the statute.

> Amounts of mineral tax and income tax paid or accrued to the Province of British Columbia by a domestic corporation are deductible as business expenses from the taxable income of the corporation.

Tasmania, South Australia, Western Australia, and New South Wales are subdivisions of the self-governing British possession, the Commonwealth of Australia, and, therefore, in view of Office Decision 1050, the claims for credit for income taxes paid to these countries should be disallowed. However, in view of this same decision, these items are deductible as business expenses from the taxable income of the company. In the case of the income tax paid to the Union of South Africa, the claim for credit should be allowed. Article 382 of Regulations 62 provides in part as follows:

> "Foreign country" includes within its meaning any foreign sovereign State or self-governing colony (for example, the Dominion of Canada).

The Union of South Africa is one of the self-governing colonies of the British Empire. Its relation to the British Empire is similar to that of Canada. Its subdivisions are the Cape of Good Hope, Orange Free State, Natal, Transvaal, and Southwest Africa. It has its own government and its legislative power rests with a senate and a house of assembly.

Therefore, it is the opinion of this office that the Union of South Africa is a "foreign country" as contemplated by section 238 (a) of the Revenue Act of 1918.

* * * * * *

The claims for credit for income taxes paid to Great Britain, Norway, Spain, and France should be allowed.

APPENDIX C

(The following extracts are taken from Quick, "Legislative Powers, Commonwealth and States of Australia," pp. 115 to 913:)

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT

(63 and 64 Victoria, c. 12)

An Act to constitute the Commonwealth of Australia

JULY 9, 1900.

Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established;

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

* * * * *

5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and

people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

6. "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

"The States" shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called "a State."

"Original States" shall mean such States as are parts of the Commonwealth at its establishment.

7. The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

8. After the passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purpose of that Act.

9. The Constitution of the Commonwealth shall be as follows:

CHAPTER I.—THE PARLIAMENT

* * * * *

Part V.—Powers of the Parliament

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(i) Trade and commerce with other countries, and among the States;

(ii) Taxation; but so as not to discriminate between States or parts of States;

(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;

(iv) Borrowing money on the public credit of the commonwealth;

(v) Postal, telegraphic, telephonic, and other like servies;

(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;

(vii) Lighthouses, lightships, beacons, and buoys;

(viii) Astronomical and meteorological observations;

(ix) Quarantine;

(x) Fisheries in Australian waters beyond territorial limits;

(xi) Census and statistics;

(xii) Currency, coinage, and legal tender;

(xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;

(xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;

(xv) Weights and measures;

(xvi) Bills of exchange and promissory notes;

(xvii) Bankruptcy and insolvency;

(xviii) Copyrights, patents of inventions and designs, and trade marks;

(xix) Naturalization and aliens;

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

(xxi) Marriage;

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;

(xxiii) Invalid and old-age pensions;

(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;

(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;

(xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws;

(xxvii) Immigration and emigration;

(xxviii) The influx of criminals;

(xxix) External affairs;

(xxx) The relations of the Commonwealth with the islands of the Pacific;

(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth;

(xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;

(xxxiv) Railway construction and extension in any State with the consent of that State;

(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides;

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal

Judicature, or in any department or officer of the Commonwealth.

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;

(ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth;

(iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

* * * * *

CHAPTER II.—THE EXECUTIVE GOVERNMENT

* * * * *

69. On a date or dates to be proclaimed by the Governor General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth:

Posts, telegraphs, and telephones:
Naval and military defense:
Lighthouses, lightships, beacons, and buoys:
Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which

at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

* * * * *

CHAPTER IV.—FINANCE AND TRADE

* * * * *

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

* * * * *

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

* * * * *

98. The power of the Parliament to make laws with respect to trade and commerce extends to

navigation and shipping, and to railways the property of any State.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

* * * * *

CHAPTER V.—THE STATES

106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

* * * * *

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

* * * * *

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any

disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

118. Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

* * * * *

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